Supreme Court of the United States.

No. 541.—October Term, 1904.

Daniel R. Kendall, Appellant, vs. The American Automatic Loom Company.	Appeal from the Circuit Court of the United States for the Southern District of New York.

[May 29, 1905.]

This suit was brought against the defendant, appellee, for the purpose of obtaining a discovery of all the matters referred to in the bill of complaint, and to have a receiver appointed of the assets of the company within the State of New York, and for an accounting by the directors of the defendant, and for other relief.

The bill alleged that the plaintiff, at the time of filing his bill, was a citizen of the United States and of the State, county and city of New York; that the defendant was a stock corporation, organized in March, 1898, and existing under the laws of the State of West Virginia, and was incorporated to engage in the business of manufacturing and selling looms and weaving machinery, and that by its charter its principal office and place of business was in the city, county and State of New York. The bill of complaint, together with a writ of subpœna requiring the defendant to answer the bill, were served in the city of New York upon a person who had been the treasurer of the defendant corporation. Within the proper time the defendant appeared specially, for the sole purpose of questioning the jurisdiction of the court and of moving to set aside the attempted service.

The motion was founded upon the affidavit of Joseph H. Emery, in which he averred, among other matters, that the service of the subpœna had been made upon him in the city of New York, because (as he believed) he had been the treasurer of the defendant corporation; that the domicil and residence of the defendant were in the State of West Virginia; the purpose of its incorporation was the development of a self-feeding loom attachment, which gives to the ordinary loom a continuous supply of filling thread. It was further stated in the affidavit that the corporation was the owner of divers patents, but it had never manufactured merchandise. It had never made a sale, and it had never engaged in the transaction of the business for which it was incorporated. It had no business or assets in the State of New York, and had no office or place of business there, and those of its officers who resided in that State were not there

officially, or as representing any business or interest of the corporation. After the formation of the corporation, and between the years 1898 and 1901 the meetings of the directors of the company were held at different places in the city of New York where accommodations could be secured, sometimes at the office of the counsel of the company in New York and sometimes at a hotel; but since August 10, 1901, there had been no meeting, either of the stockholders or of the directors, and on the last-mentioned date the stockholders were notified that the company had no funds with which to pay the franchise taxes which were due to the State of West Virginia, and affiant averred that no funds had since been provided for that purpose; that since that date the company had transacted no business, had maintained no office in the State of New York, and that an action had been commenced by the State of West Virginia against it to terminate and forfeit its corporate franchise. The sole assets of the company consisted of two automatic looms and tools and machinery employed in the making thereof and its patents. The looms, with machinery and tools, were in Attleboro, Massachusetts. The letters patent were also in the possession of a Mr. Mossberg, in Attleboro, Massachusetts, who had made divers attempts to improve the looms. The company had no bank account, no office force, and no employees. It had never reached the stage of the active transaction of business, and such assets as it possessed were beyond the jurisdiction of the court. No one had been elected treasurer in place of Mr. Emery, so far as the record shows, and he was the treasurer of the company when service was made upon him.

An affidavit in opposition was filed by the complainant, but the facts above set forth were substantially undenied. The Circuit Court, upon the hearing, granted the motion of the defendant to set aside and declare null and void the attempted service on the corporation of the bill of complaint and writ of subpœna by the service thereof upon Joseph H. Emery, on or about the 13th day of December, 1904. The complainant has appealed directly to this court from the order of the Circuit Court setting aside the service of the subpœna.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the Court.

It is objected, in the first place, by the appellee that the appellant had no statutory right to appeal directly to this court from the order setting aside the service of the subpœna. It is asserted that the case does not involve the jurisdiction of the court below within the meaning of section 5 of the act of March 3, 1891, inasmuch as the jurisdiction of the Circuit Court as a Federal court is not questioned, the jurisdiction being denied upon grounds alike applicable to any other judicial tribunal, State or Federal, under the same circumstances. This case is, however, on that